Statute Cited

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Authorities Cited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2

ERNEST V. HORVATH and GEORGE A. HORVATH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION

The United States in its Memorandum in Opposition completely ignores the fact that the courts below failed to consider Rule 60(b)(6) of the Federal Rules of Civil Procedure. This failure is significant as the Second Circuit expressly recognized that its view was contrary to that of the Ninth Circuit in *Patapoff* v. *Vollstedt's, Inc.*, 267 F. 2d 863 (9th Cir. 1959). It has been stated that there has been a "confusion of opinion and muddled application" of Rule 60(b)(1) and 60(b)(6) by the lower Federal courts and that this "manifest confusion" stems from the plethora of opinions issued by this court in *Klapprott* v. *United States*, 335 U. S. 601 (1949) and *Ackermann* v. *United States*, 340 U. S. 193 (1950).[1]

[1] Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 Mo. L. Rev. 427, 437-439 (1968).

The proper interpretation of Rule 60(b)(6) is the subject of current controversy as made manifest by the Fifth Circuit case of *Transit Casualty Co.* v. *Security Trust Company*, 441 F. 2d 788 (5th Cir. 1971). In that case the plaintiffs' lawsuit involving in excess of one million dollars was dismissed without having once been brought to court on the merits and there is now pending a Petition for Writ of Certiorari before this Court under number 71-228, August 13, 1971.

The writer of the Missouri Law Review article referred to earlier, although taking a more restricted approach than we believe justified, recognized that "courts have allowed some parties limited relief under Rule 60b(6) when the conduct of their attorney is grossly improper, and the party himself ought not in all equity suffer for it."[2] and cited cases therefor.[3] Attention is also respectfully directed to the cases of *Griffin* v. *Kennedy*, 344 F. 2d 198 (D. C. Cir. 1965); *United States* v. *Williams*, 109 F. Supp. 456 (W. D. Ark. 1952); and *Robins* v. *Pitcairn*, 3 F. R. S. 601 (N. D. Ill. 1940).

The court's denial of petitioners' motion under Rule 60(b)(1) was not only an abuse of discretion but also an improper punishment of petitioners for excusable neglect, error or mistake of their attorneys. To permit a default judgment to stand without a trial on the merits is even more unjust when the United States government is the party taking the judgment. Thus, as stated in *Fleming* v. *Huebsch Laundry Corp.*, 159 F. 2d 581, 584 (7th Cir. 1947): "We are dealing with a citizen and his government. The

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[2] 33 Mo. L. Rev. 440 (1968).

[3] *Hutton* v. *Fisher*, 359 F. 2d 913 (3rd Cir. 1966); *Barber* v. *Turberville*, 218 F. 2d 34 (D. C. Cir. 1954); *Dyotherm Corp.* v. *Turbo Machine Co.*, 39 F. R. D. 370 (E. D. Pa. 1966); *Minneapolis Brewing Co.* v. *Merritt*, 143 F. Supp. 146 (No. Dak. 1956).

latter should not demand money unless the citizen owes it. Moreover, if it erred in its demand it should be eager to undo the mistake. Good or loyal citizenry is not bred or developed by such conduct.''

This Court should not permit Rule 60(b) to be construed so strictly so as to exalt form over substance and to defeat the liberal application for which Rule 60(b) was designed.[4]

Respectfully submitted,

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[4] See Wham, *Federal District Court Rule 60(b): A Humane Rule Gone Wrong*, 49 A. B. A. Journal 566 (1963).